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Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-01–9 OF 2005

GOPAL SRI RAM, ZALEHA ZAHARI AND ZAINUN ALI JJCA

21 APRIL 2008

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Contract — Breach — Building contract — Non-completion of grass turfing even though building was completed — Whether amounted to a breach of fundamental terms of contract, going to its root — Whether appellant had performed its obligation under contract, both principal and supplementary —

D

Doctrine of substantial performance

Contract — Building contract — Delay — Respondent had acquiesced several times to extensions of time — Whether a waiver

E

Contract — Damages — Assessment — Damages claimed for being blacklisted by PWD — Difficulty of proof — Standard required in such circumstances

F

On 2 March 1993, the appellant/plaintiff, a building contractor entered into a contract using the Standard PWD (JKR) form with the respondent/defendant to build a school. The contract was to be completed by the appellant on or before 29 August 1994. It was not in dispute that the

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appellant failed to complete the building of the school within the time stipulated. The respondent was granted an extension of time for nine weeks till 31 October 1994. This was the first of several extensions. Finally, on 12 September 1995, the respondent issued a notice of intention to terminate the contract pursuant to cl 51 of the contract giving the appellant 14 days

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within which to complete the contract. However, the appellant had not been able to execute the contract satisfactorily. Thus on 7 October 1995, notice to terminate the contract pursuant to cl 51(a) was issued to the appellant. However, despite various notices, the respondent allowed the appellant, upon its request, to continue to complete the construction of the school.

I

The construction of the school was duly completed and officially accepted by the Ministry of Education on 5 June 1996. The appellant accordingly contended that the Ministry accepted the construction of the school. But the respondent's position was that despite this, the appellant had failed to complete the construction of the school due to the non-compliance of the

terms in that the grass turfing was not planted according to the specifications in the contract. The respondent further reiterated that the construction was in fact not completed within the period allowed to the appellant, since the grass turfing was incomplete as at 20 May 1996. Consequently the respondent by letter dated 5 July 1996 revived the former notice of termination and informed the appellant that the contract was now terminated in accordance with the said notice of 7 October 1995. The letter of 5 July 1996 (terminating the contract) stated that the reason for termination was that the grass turfing was not done within the period allowed ie on or before 20 May 1996. The appellant claimed that the respondent owed the appellant a balance of RM501.817.66 and the appellant also claimed the sum of RM2.8m for loss of future contract as a result of this dispute, since it jeopardised its status in that the appellant was blacklisted by PWD. The respondent contended that the amount claimed by the appellant in the sum of the RM501,817.66 was not paid by them to the appellant, since this amount was taken and considered as a set off payment towards the liquidated ascertained damages ('LAD') imposed, due to the appellant's failure and delay in completing the contract.

Held, allowing the appeal with costs here and below:

(1) (per **Zainun Ali JCA**) There appeared to be non-compliance with the requirement of cl 51, in that the notice did not contain the precise ground of termination. Thus, in itself the notice was bad. The respondent's attempt at rectifying this failed, and in fact it worsened the situation when it said that it was justified to terminate the contract on account of the numerous extensions given to the appellant to perform the contract (see paras 66–67).

(2) (per **Zainun Ali JCA**) The several delays caused by the appellant were not so dire as to frustrate the entire consideration for the contract. There was nothing in the contract that had placed any condition, the breach of which would entitle the innocent party to repudiate the contract. If delay by the appellant was to be the main factor for termination (quite apart from unsatisfactory work, defective workmanship etc) that particular reason could not be said to be a condition or warranty going to the root of the contract. Although a period of time for completion was necessarily in place here, one had to construe the entire contractual terms and conduct of parties for its effect and consequence. Time was a factor but in the court's view time no longer became the essence and in fact was vitiated when the respondent had acquiesced several times to the extensions of time asked for by the appellant (see paras 69–70).

(3) (per **Zainun Ali JCA**) The inability of the appellant to complete the contract within the time frame was not a particular stipulation which was regarded as condition, going to the root of the contract, that it was clear that the parties contemplated that a breach of which entitled the other party at once to treat the contract as at end. In fact no such condition existed in the principal or supplementary contract. On the facts, there was firstly substantial performance of the contract by the appellant and secondly there was acquiescence on the part of the respondent to vary the contractual terms, even if that acquiescence was grudging. It is now established by the doctrine of substantial performance that a promisor who has substantially performed his side of the contract may sue on the contract for the agreed sum, though he remained liable in damages for his partial failure to fulfill his contractual obligations (see paras 77–78 & 80–84).

(4) (per **Zainun Ali JCA**) The only 'defect' if it could be termed as such, was the planting of 'hydro seeding' instead of 'cow grass' on the football field. Although the respondent objected to this non-compliance of the terms of the contract, no notice was sent out by the respondent to the appellant. The respondent instead, took the drastic step of terminating the contract on the ground that the grass turfing was not completed within the time specified (see para 95).

(5) (per **Zainun Ali JCA**) In view of the various extensions given by respondent and the fact that there was substantial performance, the respondent was estopped from imposing LAD on the appellant. The respondent was barred by the doctrine of estoppel from denying the indulgence granted to the appellant, which in any case amounted to variation of the terms of the contract. And as both parties had acted on the basis of the said varied terms of agreement, the respondent was now estopped by conduct from denying it (see para 112); *Boustead Trading Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 31 referred.

(6) (per **Gopal Sri Ram JCA**) It was not open to the defendant to rely on the letter of 7 October 1995. If, as the defendant alleged, the plaintiff had committed a fundamental breach of the contract, the defendant had two mutually exclusive options open to him. He could accept the plaintiff's repudiation and treat the contract as at an end. Or he could waive the repudiatory conduct and treat the contract as subsisting. These options were given to him by s 40 of the Contracts Act 1950. The defendant having made his election to affirm the contract, his right to put an end to it was forever lost (see para 5); *Lim Ah Moi v AMS Periasamy Suppiah Pillay* [1997] 3 MLJ 323 referred.

(7) (per **Gopal Sri Ram JCA**) There was no doubt that the blacklisting of a contractor by the PWD could have serious financial ramifications for the appellant. It is an established principle that breach of contract is

actionable per se. In other words, damage, that is to say, injuria, need not be separately established as an ingredient of the wrong. Neither is a plaintiff in an action for breach of contract required in law to prove that the defendant acted intentionally or negligently in committing the breach. Once a breach of contract is established a plaintiff is entitled to recover damages. What follows is an exercise in the assessment of those damages. If at that stage he or she is unable to evidentially establish the measure of damage suffered, nominal damages will be awarded (see paras 11–12).

[Bahasa Malaysia summary

Pada 2 Mac 1993, perayu/plaintif, kontraktor bangunan memasuki kontrak dengan responden/defendan menggunakan borang standard PWD (JKR) untuk membina sekolah. Kontrak tersebut mesti disiapkan oleh perayu pada atau sebelum 29 Ogos 1994. Ia tidak dipertikaikan bahawa perayu gagal untuk menyiapkan bangunan dalam masa yang ditetapkan. Responden diberikan pelanjutan masa untuk sembilan minggu sehingga 31 Oktober 1994. Ini adalah pelanjutan masa pertama daripada beberapa pelanjutan. Akhirnya, pada 12 September 1995, responden mengeluarkan notis niat untuk menamatkan kontrak, berikutan klausa 51 kontrak, memberikan perayu 14 hari dalam mana untuk menyiapkan kontrak. Walau bagaimanapun, perayu tidak dapat melaksanakan kontrak dengan memuaskan. Oleh itu, pada 7 Oktober 1995, notis untuk menamatkan kontrak berikutan klausa 51(a) dikeluarkan kepada perayu. Walau bagaimanapun, walaupun berbagai notis diberikan, responden membenarkan perayu, atas permintaannya, untuk menyiapkan pembinaan sekolah tersebut. Pembinaan sekolah siap dan telah secara rasmi diterima oleh Kementerian Pelajaran pada 5 Jun 1996. Perayu oleh itu berhujah bahawa Kementerian menerima pembinaan sekolah tersebut. Tetapi pandangan responden adalah walaupun begini, perayu gagal untuk menyiapkan pembinaan sekolah kerana tidak mematuhi terma-terma di mana penanaman rumput tidak ditanam mengikut spesifikasi di dalam kontrak. Responden selanjutnya mengulangi bahawa pembinaan sebenarnya tidak siap dalam tempoh masa yang dibenarkan kepada perayu, memandangkan penanaman rumput tidak siap pada 20 Mei 1996. Akhirnya, responden melalui surat bertarikh 5 Julai 1996 memberi notis penamatan asal dan memberitahu perayu bahawa kontrak tersebut telah ditamatkan menurut notis bertarikh 7 Oktober 1995. Surat bertarikh 5 Julai 1996 (kontrak penamatan) menyatakan bahawa alasan penamatan adalah bahawa penanaman rumput tidak dibuat dalam tempoh yang dibenarkan iaitu pada atau sebelum 20 Mei 1996. Perayu mendakwa bahawa responden berhutang dengan perayu baki sejumlah RM501.817.66 dan perayu juga menuntut jumlah RM2.8j sebagai kerugian kontrak masa depan akibat daripada pertikaian ini, memandangkan ia telah menjejaskan

A statusnya yang mana perayu telah disenaraihitamkan oleh PWD. Responden menegaskan bahawa jumlah yang dituntut oleh perayu sejumlah RM501,817.66 tersebut tidak dibayar oleh mereka kepada perayu, memandangkan jumlah ini telah diambil dan dianggap sebagai bayaran set off terhadap ganti rugi jumlah tertentu ('GJT') yang dikenakan, akibat B daripada kegagalan perayu dan kelewatan menyempurnakan kontrak tersebut.

C **Diputuskan**, membenarkan rayuan tersebut dengan kos di sini dan di Mahkamah Tinggi:

(1) (oleh **Zainun Ali HMR**) Terdapat ketidakpatuhan dengan keperluan klausa 51, di mana notis tersebut tidak mengandungi alasan yang tepat untuk penamatan. Oleh itu, notis tersebut dengan sendirinya tidak D betul. Percubaan responden untuk membetulkan ini gagal, dan bahkan memburukkan keadaan apabila ia menyatakan ia mempunyai alasan yang baik untuk menamatkan kontrak setelah mengambilkira lanjutan masa yang banyak kali telah diberikan kepada perayu untuk melaksanakan kontrak (lihat perenggan 66–67).

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(2) (oleh **Zainun Ali HMR**) Beberapa kelewatan yang disebabkan oleh perayu tidak terlalu mendesak sehingga menghalang keseluruhan balasan untuk kontrak tersebut. Tidak terdapat apa-apa di dalam kontrak yang meletakkan apa-apa syarat, kemungkiran yang mana akan F membenarkan pihak yang tidak bersalah untuk membatalkan kontrak. Sekiranya kelewatan oleh perayu dijadikan faktor utama untuk penamatan (selain daripada kerja yang tidak memuaskan, kemahiran kerja yang defektif dan lain-lain) sebab tertentu itu tidak boleh dianggap sebagai syarat atau waranti yang ke akar umbi kontrak. G Meskipun tempoh masa penyiapan sememangnya wujud di sini, seseorang itu perlu mentafsirkan keseluruhan terma-terma kontraktual dan perlakuan pihak-pihak untuk mendapat kesan dan akibatnya. Masa merupakan satu faktor tetapi pada pendapat mahkamah masa tidak lagi penting dan pada hakikatnya menjadi tidak sah apabila responden H bersetuju beberapa kali terhadap lanjutan-lanjutan masa yang dipohon oleh perayu (lihat perenggan 69–70).

(3) (oleh **Zainun Ali HMR**) Ketidakupayaan perayu untuk menyiapkan kontrak dalam rangka masa bukan ketetapan tertentu yang diambilkira sebagai syarat, punca kontrak tersebut, bahawa ia adalah jelas bahawa I pihak-pihak mempertimbangkan bahawa kemungkiran yang membenarkan pihak yang satu lagi terus menganggap kontrak tersebut sebagai tamat. Sebenarnya, syarat sebegitu tidak wujud di dalam kontrak utama ataupun tambahan. Atas fakta, pertamanya terdapat pelaksanaan substansial kontrak oleh perayu dan keduanya terdapat

persetujuan di pihak responden untuk mengubah terma-terma kontraktual, meskipun persetujuan itu diberikan dengan berat hati. Adalah ditetapkan oleh doktrin pelaksanaan substansial bahawa orang yang berjanji yang telah melaksanakan sebahagian besar kontrak di pihaknya boleh menyaman atas kontrak itu untuk jumlah yang dipersetujui, meskipun dia masih bertanggungjawab untuk ganti rugi kerana sebahagian daripada kegagalannya untuk memenuhi tanggungjawab kontraktualnya (lihat perenggan 77–78 & 80–84).

(4) (oleh **Zainun Ali HMR**) Satu-satunya 'defect' jikapun ia dianggap sedemikian, adalah penanaman 'hydro seeding' dan bukan 'cow grass' atas padang bola sepak itu. Meskipun responden membantah terhadap ketidakpatuhan terma-terma kontrak ini, tiada notis dihantar keluar oleh responden kepada perayu. Responden sebaliknya, telah mengambil langkah drastik menamatkan kontrak tersebut atas alasan bahawa penanaman rumput itu tidak disiapkan dalam tempoh yang ditetapkan (lihat perenggan 95).

(5) (oleh **Zainun Ali HMR**) Berdasarkan beberapa lanjutan masa yang telah diberikan oleh responden dan hakikat bahawa terdapat pelaksanaan substansial, responden diestopkan daripada mengenakan GJT ke atas perayu. Responden telah dihalang oleh doktrin estopel daripada menafikan persetujuan yang diberikan kepada perayu, yang mana dalam apa keadaan membentuk perubahan terma-terma kontrak. Dan memandangkan kedua-dua pihak telah bertindak berdasarkan terma-terma perjanjian yang diubah, responden kini diestopkan daripada menafikannya (lihat perenggan 112); *Boustead Trading Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 31 dirujuk.

(6) (oleh **Gopal Sri Ram HMR**) Ia tidak terbuka kepada defendan untuk bergantung kepada surat bertarikh 7 Oktober 1995. Jika, sepertimana yang didakwa oleh defendan, plaintif telah melakukan perlanggaran penting kontrak, defendan mempunyai dua pilihan yang terbuka untuknya. Dia boleh menerima penamatan plaintif dan menganggap kontrak tersebut telah tamat. Ataupun dia boleh mengenepikan tindakan penamatan itu dan menganggap kontrak tersebut masih wujud. Pilihan-pilihan tersebut telah diberikan di bawah s 40 Akta Kontrak 1950. Defendan yang telah membuat pilihan untuk mengesahkan kontrak tersebut, melupuskan haknya untuk menamatkan kontrak itu (lihat perenggan 5) *Lim Ah Moi v AMS Periasamy Suppiah Pillay* [1997] 3 MLJ 323 dirujuk.

(7) (oleh **Gopal Sri Ram HMR**) Tidak diragukan bahawa menyenaraihitamkan kontraktor oleh PWD akan menyebabkan kesan kewangan yang serius untuk perayu. Ia adalah prinsip tetap bahawa pelanggaran kontrak boleh diambil tindakan per se. Dalam erti kata lain, kerugian, yang dikatakan, *injuria*, tidak perlu dibuktikan secara

berasingan sebagai suatu faktor yang salah. Plaintif juga bukan dalam tindakan kerana pelanggaran kontrak yang dikehendaki di sisi undang-undang untuk membuktikan bahawa defendan telah bertindak dengan sengaja atau cuai dalam melakukan pelanggaran itu. Setelah pelanggaran kontrak dibuktikan plaintif berhak mendapat ganti rugi. Selanjutnya adalah pelaksanaan dalam penaksiran ganti rugi tersebut. Sekiranya di peringkat itu dia tidak boleh membuktikan dengan keterangan ukuran ganti rugi yang dialami, ganti rugi nominal akan diawardkan (lihat perenggan 11–12).]

Notes

For a case on breach of building contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2548.

For cases on assessment of damages, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3240–3245.

For cases on delay under building contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2830–2844.

Cases referred to

Appleby v Myers (1867) LR 2 CP 651 (refd)

Berry v Hodson [1988] 1 Qd R 361 (refd)

Bolton v Mahadeva [1972] 3 All ER 1322 (folld)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Central Provident Fund Board v Ho Bock Kee [1981] 2 MLJ 162 (refd)

Champtaloup v Thomas [1976] 2 NSWLR 264 (refd)

Chaplin v Hicks [1911] 2 KB 786 (refd)

Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305 (refd)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191 (refd)

Hoenig v Isaacs [1952] 2 All ER 176 (refd)

Holland v Wiltshire (1954) 90 CLR 409 (refd)

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 (folld)

KP Kunchi Raman v Goh Brothers Sdn Bhd [1978] 1 MLJ 89 (folld)

Kiely & Sons Ltd v Medcraft (1965) 109 Sol Jo 829 CA (refd)

Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay [1997] 3 MLJ 323 (refd)

Pepper v Hart [1993] AC 593 (refd)

Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556 (refd)

Simpson v The London and North Western Railway Co [1876] 1 QB 274 (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] MLJ 229 (refd)

Stern v McArthur (1988) 165 CLR 489 (refd)

Tham Cheow Toh v Associated Metal Smelters Ltd [1972] 1 MLJ 171 (refd)

Whitaker v Dunn (1887) 3 TLR 602 (refd)

Legislation referred to

Contracts Act 1950 s 40
Sale of Goods Act 1893 [UK]

Appeal from: Civil Suit No 22–97 of 1997 (High Court, Seremban)

Aris Rizal Christopher Fernando (Raftifizi bin Zainal Abidin with him) (Aris Rizal Christopher Fernando & Co) for the appellant.
Noramilia Mohd Saad (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA:

[1] There is only one issue in this case. It is whether the plaintiff (appellant before us) is entitled to recover damages for breach of a building contract he had entered into with the defendant (respondent before us). The relevant facts are as follows.

[2] The plaintiff is a building contractor. On 2 March 1993, it entered into a contract for the construction of a school for the defendant. The contract was in the standard PWD (JKR) form with which we are all quite familiar. The contract price was RM1,956,126. The contract period was 78 weeks, that is to say, the plaintiff had to complete construction of the school and hand it to the defendant within that period. It is not on dispute that the 78 weeks expired on 29 August 1994. As it happened, the plaintiff did not complete construction by the agreed date. However, there is abundant evidence to show that the plaintiff was granted several extensions by the defendant. It is also beyond dispute — indeed it is conceded by the defendant that as at 12 September 1995 (which is the date of his letter) the plaintiff had completed 93% of the work. What was left undone was certain remedial work in respect of some of the partitions in the building and the planting of grass on the hill slopes and the football field. The former was completed. As to the latter, the defendant accepted the turfing that was done on the hill slopes but he rejected the turfing of the football field which he wanted turfed with cow grass which is not the kind of grass that the plaintiff had used. Despite the aforesaid state of affairs, the defendant took the position that the work contracted for had not been completed. So, by his letter of 12 September 1995, to which I have referred, the defendant warned the plaintiff to complete all works within 14 days. The defendant warned that if the plaintiff should make default then cl 51 of the contract would be invoked and the contract terminated. Later, by his letter of 7 October 1995, the defendant terminated the contract, purporting to act under cl 51(a) thereof. In essence what that clause says is this: without prejudice to any other remedies the Government (in the present instance the defendant) may have,

in the event of the plaintiff commits any of the breaches specified by sub-cll (i)–(v) of cl 51, the superintending officer ('SO') administering the contract may issue a notice to the contractor (the instant plaintiff) calling upon him to remedy the breach and if the breach persists for 14 days then the SO may terminate the contract.

[3] There are three matters relating to the letter of 7 October 1995 that require mention. First, on 11 October 1995, some four days after the letter was written, a meeting was held between the parties. It was agreed that the defendant will be granted a further extension. Nothing was said about the letter itself. Second, the State Engineer, after a review of the facts, recommended that the plaintiff be excused for 17 weeks of delay. Despite this the defendant only permitted the plaintiff only 9 weeks. The defendant did not at any time reserve his rights under the letter of 7 October. How could he? The 9 weeks extension he gave the plaintiff far exceeded the 14 days the SO had prescribed under the letter. The irresistible inference to be drawn from all these actings is that the parties regarded the notice of 7 October 1995 as a dead letter intended to have no effect whatsoever. It therefore ceased, for all purposes, to have any effect whatsoever. Further, there is cogent evidence from the plaintiff to show that at the meeting of 11 October 1995 the defendant had waived his right to claim liquidated ascertained damages ('LAD') from the plaintiff for the delay in completing construction. Third, if you look at the 7 October 1995 letter, you will find that it does not accord with the terms of cl 51. I will deal with this part of the case at the appropriate place in this judgment.

[4] Let me now conclude the factual narrative. On 5 June 1996, the school constructed by the plaintiff was officially handed over to the Ministry of Education which accepted it. Then, on 5 July 1996, the defendant wrote to the plaintiff alleging that the latter had not completed the works under the contract and on that basis sought to reinstate and rely upon the letter of 7 October 1995 which by this time was, of course, dead as a doornail. The plaintiff refused to accept the termination. It issued writ. The defendant delivered his defence and counterclaim. The judge who tried the action found for the defendant. He dismissed the claim and entered judgment on the defendant's counterclaim. The plaintiff has now appealed to us.

[5] In my respectful view, this appeal must succeed for the following reasons. In the first place, it is not open to the defendant to rely on the letter of 7 October 1995. If, as the defendant alleges, the plaintiff had committed a fundamental breach of the contract, the defendant had two mutually exclusive options open to him. He could accept the plaintiff's repudiation and treat the contract as at an end. Or he could waive the repudiatory

conduct and treat the contract as subsisting. These options are given to him by s 40 of the Contracts Act 1950 which reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

The defendant's conduct in granting the plaintiff extensions of time does in my judgment fairly support the plaintiff's case that there was acquiescence on the part of the defendant in the continuance of the contract. There is also the fact that the Ministry of Education accepted without any reservation the handing over of the school to it on 5 June 1996. The defendant having made his election to affirm the contract, his right to put an end to it was forever lost. See, *Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323.

[6] In the second place, the notice of termination which the defendant sought to issue pursuant to the terms of clause 51 of the contract does not accord with the terms of the clause. For it does not specify the breach in question as required by the clause. It is settled law that clauses such as the one under discussion will be construed strictly, that is to say, their strict compliance will be sought by the courts. As Wee Chong Jin CJ said in *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162, 'a forfeiture clause in a building contract will be strictly construed to see whether the operative event has occurred or not'. In my judgment the notice dated 7 October 1995 was null and void and of no effect because it does not comply with the terms of cl 51. It is also my judgment that the defendant's attempt to reinstate the said notice by way of its letter dated 5 July 1996 was ineffective. You cannot reinstate something that is utterly void.

[7] In the third place, the defendant's contention that the plaintiff had committed a fundamental breach of the contract cannot succeed on the facts of this case. There is the defendant's own admission that as at 12 September 1995, 93% of the work was completed. There was no demand made by the defendant of the plaintiff to remedy any defect in the school building itself despite the fact that it was, as conceded by DW2 in his evidence, that it was open for the defendant to have done so. The only real complaint which the defendant had was in relation to the laying of the cow grass on the playing field. This in my judgment is a trivial breach for which the defendant would not be entitled to put the contract to an end. This is because the plaintiff did not refuse to perform or disable itself from performing the contract in its entirety. In short, there is not here a state of affairs where — to borrow the language of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 — 'the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the

whole benefit which it was the intention of the parties that he should obtain from the contract'. Accordingly, it was not open to the defendant to put an end to the contract. It follows that his act of terminating the contract amounted to a breach of contract.

[8] There is one further matter I must mention. In the court below it was part of the plaintiff's case that the defendant's witness ('DW1') had acted in bad faith in the dealings he had with the plaintiff. The learned judge who tried the case however refused to permit the plaintiff to cross examine DW1 on the point. Yet when he came to write his judgment he said that the plaintiff had failed to establish mala fides against the defendant. This, with respect, is a serious misdirection. Having denied counsel for the plaintiff the opportunity to cross examine DW1 on the issue of mala fides, it was not open to him, as a matter of natural justice, to make a finding on the very point against the plaintiff. There is, so far as I am advised, no decided case directly in point. The closest analogy that comes to mind is *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191. It was a case that was decided at a time when it was the rule that courts should not seek assistance from *Hansard* to interpret a statute. There is no such bar now. See, *Pepper v Hart* [1993] AC 593. In *Hadmor Productions*, at the hearing before the Court of Appeal, counsel on both sides, in obedience to the rule, refrained from making any reference to *Hansard*. During argument, Lord Denning MR who presided gave no indication to counsel that he intended to rely on *Hansard*. However, when he came to write his judgment the Master of the Rolls when interpreting the relevant provision in the statute before the court referred to the speech of Lord Wedderburn in the House of Lords reported in *Hansard* when moving an unsuccessful opposition amendment to the relevant Bill. When the matter went on further appeal to the House of Lords, Lord Diplock criticised this approach. He said:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case counsel for Hamilton and Bould complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill through the two Houses of Parliament; and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech in the House of Lords, but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to *Hansard*.

[9] In the present case, when the learned trial judge disallowed counsel for the plaintiff from pursuing the line of cross examination on the issue of DW1's mala fides counsel was entitled to assume that no adverse comment would be made against his client on that point. Unfortunately, the learned judge after having made his decision nevertheless went on to comment adversely on the plaintiff's case. This is a clear breach of the rules of natural justice. If this be the only point before us, I would have been minded to direct a retrial of the action. However, there are, as I have shown, other areas in which the learned judge had misdirected himself both on the facts and the law.

[10] I now come to the issue of damages. In its statement of claim, the plaintiff claimed the balance due to it on the contract. This is a sum of RM501,817.66. It is entitled to have this. It is also the plaintiff's case that following the termination of the contract it was blacklisted in so far as Government contracts are concerned. It said that it suffered general damages. It put these at RM2.8m.

[11] There is no doubt that the blacklisting of a contractor by the PWD can have serious financial ramifications for him. He will not ever be considered in the execution of Government projects. Even work in the private sector may be difficult to come by. These are matters of public notoriety. It follows that the plaintiff must have suffered some damage from the blacklisting. Perhaps not to the extent it has claimed. It may be difficult to assess the damage. But that is no reason for refusing to make an award in its favour. In *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171, Ali J (as he then was) cited with approval the following passage in the judgment of Cockburn CJ in *Simpson v The London and North Western Railway Co* [1876] 1 QB 274 at p 277:

> … as to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.

[12] There is a further point which is in the plaintiff's favour. It is an established principle that breach of contract is actionable per se. In other words, damage, that is to say, injuria, need not be separately established as an ingredient of the wrong. Neither is a plaintiff in an action for breach of contract required in law to prove that the defendant acted intentionally or negligently in committing the breach. Once a breach of contract is established a plaintiff is entitled to recover damages. What follows is an exercise in the assessment of those damages. If at that stage he or she is unable to evidentially establish the measure of damage suffered, nominal damages will be awarded. As my learned sister Zainun Ali JCA said when delivering

A the judgment of this court in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] MLJ 229 (at p 242):

> Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given.

B

[13] Acting on these well settled principles, I would award the plaintiff general damages for breach of contract and direct the assessment of such damages by the senior assistant registrar of the High Court. I would also C direct an early hearing of the assessment.

[14] For the reasons already given I would allow this appeal and set aside the order of the learned judge. I have had the advantage of reading my learned sister Zainun Ali JCA's judgment in draft and agree with the orders D she proposes to make in this appeal.

Zainun Ali JCA:

E

[15] On 2 March 1993, the appellant, a building contractor (plaintiff in the court below,) entered into a contract using the standard PWD (JKR) form with the respondent (defendant) to build a school. The contract price was RM1,956,126 and the contract was for a period of 78 weeks. This means F that the construction of the school was to be completed by the appellant on or before 29 August 1994. It was not in dispute that the appellant failed to complete the building of the school within the time stipulated.

[16] The respondent then granted an extension of time for nine weeks till G 31 October 1994. This was the first of several extensions. The appellant was still unable to complete it and on 5 November 1994, the appellant requested another extension. There is no evidence on record that another extension was granted but the conduct of parties show that an extension was in fact granted. On 26 October 1994, a certificate of non-compliance was issued to the H appellant by the superintending officer ('SO'). On 24 November 1994, the respondent issued a final warning letter to the appellant to complete the construction of the school and stated the appellant liable for liquidated ascertained damages ('LAD') at RM630 per day.

I **[17]** The appellant responded by requesting for a further extension of time on 9 February 1995. Thus on 23 June 1995, the respondent had a meeting with the appellant to discuss other incomplete works including the construction of the school, and instructed the appellant to complete the same.

[18] On 12 September 1995, the respondent issued a notice of intention to terminate the contract, followed by its letter of 7 October 1995, where the respondent gave formal notice of termination of the contract to the appellant. A

[19] However, notwithstanding the above, the respondent allowed the appellant, upon its request, to continue to complete the construction of the school. B

[20] A further meeting was held between the parties on 11 October 1995. The appellant submitted that it was during this meeting that one Dato' Nordin Yunus, the then Director of PWD (PW1) promised to waive the LAD which the respondent had initially imposed on 24 November 1994. It was at this meeting too, that another extension was given to the appellant. C

[21] On 27 April 1996, the respondent had another meeting with the appellant. By that time another officer, Ir Zamri bin Darus ('PW2') had taken over the post of Dato' Nordin ('PW1'). The extension of the construction of the school was allowed until 20 May 1996 for the purpose of grass turfing and changing the partition to a thicker dimension. D

E

[22] PW2 then informed the appellant that in the event the appellant was unable to complete the construction within the stipulated date, the termination notice of 7 October 1995 will be invoked. According to the evidence, the construction of the school was duly completed and officially accepted by the Ministry of Education on 5 June 1996. F

[23] The appellant accordingly contends that the Ministry accepted the construction of the school. But the respondent's position is that despite this, the appellant had failed to complete the construction of the school due to the non-compliance of the terms in that the grass turfing was not planted according to the specifications in the contract. G

[24] The respondent further reiterated that the construction was in fact not completed within the period allowed to the appellant, since the grass turfing was incomplete as at 20 May 1996. H

[25] Consequently the respondent by letter dated 5 July 1996 revived the former notice of termination and informed the appellant that the contract was now terminated in accordance with the said notice of 7 October 1995. I

[26] The letter of 5 July 1996 (terminating the contract) states that the reason for termination was that the grass turfing was not done within the period allowed ie on or before 20 May 1996.

A **[27]** In response, the appellant claimed that the respondent owed the appellant a balance of RM501.817.66 (the balance of the contract sum) and the appellant also claimed the sum of RM2.8m for loss of future contract as a result of this dispute, since it jeopardised its status in that the appellant was blacklisted.

B

[28] The respondent, in reply, said that due to the appellant's breach, it had to appoint another contractor to complete the work with regards to the grass turfing.

C

THE APPELLANT'S CASE

[29] In so far as the main part of the project goes, the appellant emphasised that it had completed it, ie the building of the school itself. It can thus be
D assumed that in the absence of any complaint or notices of like effect from the respondent, the school was built according to specification. In fact during the cross-examination of SD2, he acknowledged that *the only work not done as at 27 April 1996, was the planting of the grass and the thickening of the partition.*

E

[30] The appellant indicated that they did plant the grass by 5 June 1996 but conceded that it was not done in accordance with the specifications required by the respondent in the contract.

F

[31] 'Cow grass' was supposed to have been used (as per the specification), but the appellant had instead used 'hydro-seeding' at the initial stage of the project, to which the appellant said the respondent did not object.

G **[32]** The respondent only objected when 'hydro-seeding' was also used for the football field, since the respondent wanted 'cow grass' to be planted there. However, it is the appellant's case that if it is merely on this account, the respondent is not entitled to regard that the appellant had thereby breached the contract.

H

[33] It is the appellant's position that the respondent had in any case, reneged on this issue, since the respondent had, at the meeting of 27 April 1996, stated that they are willing to accept the school even without the grass
I turfing.

[34] In short, it is the appellant's case that the respondent had not been consistent in its approach as regards its decision made at meetings regarding this particular term of the supplementary contract.

[35] The appellant submitted that the respondent's act of terminating the whole contract, only on account of the grass turfing being 'incomplete' as at 20 May 1996 as it were, was bad and wrongful.

[36] The appellant further contended that the non-completion of the grass turfing (which appellant denied) did not go to the root of the contract, as to entitle the respondent to terminate the whole contract. There is no total failure of consideration which would justify such a course of action.

[37] The appellant's parting shot was that the respondent at most, was only entitled to damages ie the portion of the non-completion of the grass turfing which amounted to RM20,000.

[38] The appellant claimed that the respondent owed them the balance of RM501,817.66 (balance of the contract sum) and RM2.8m loss of future contracts, since as a result of this dispute its status in the 'Pusat Khidmat Kontraktor' was seriously jeopardised, in that it was 'blacklisted'.

THE RESPONDENT'S CASE

[39] The respondent said that they entered into a contract on 2 March 1993 to build a school at Felda Palong Negeri Sembilan ('the project') with the appellant. The said construction was to be completed on or before 29 August 1994, ie 78 weeks after the date of the contract.

[40] However, the appellant failed to complete the contract on the appointed date.

[41] On the appellant's appeal to extend time to complete the contract, the respondent allowed an extension of nine weeks ie from 30 August 1994 till 31 October 1994.

[42] However, on the agreed day of completion ie 31 October 1994, the appellant was still unable to complete the project.

[43] Invoking cl 40 of the contract, the respondent issued a warning letter to the appellant and stated that a 'Perakuan Kerja Tidak Siap' will be issued whereby LAD of RM640 per day will be imposed on the appellant.

[44] On 26 October 1994 the said 'Perakuan Kerja Tidak Siap' was issued to the appellant and the appellant was informed that LAD would commence on 1 November 1994.

A **[45]** On 12 September 1995 the 'Notis Tujuan Penamatan Kerja' pursuant to cl 51 of the contract was issued to the appellant giving the appellant 14 days within which to complete the contract. The respondent found that the appellant had not been able to execute the contract satisfactorily within the 14 days period allowed it. Thus on 7 October 1995, the 'Notis Untuk B Penamatan Pengambilan Kerja Kontraktor' pursuant to cl 51(a) of the contract, was issued to the appellant.

[46] However, despite the various notices mentioned above, the respondent was approached by the appellant for a further extension of the contract C period.

[47] The respondent allowed appellant its request to extend time. In its submission the respondent said that it did this in its exercise of its discretion to allow the appellant its application to extend time to complete the contract. D

[48] In fact a 'Perakuan Persetujuan' dated 27 April 1996 was given by the respondent, allowing the appellant the work of planting grass and work to thicken the partition to be completed on 20 May 1996.

E

[49] In the said 'Perakuan' of 27 April 1996, it was categorically stated that in the event the appellant failed to complete the said assignments (planting grass and thickening of the partition) a notice called 'Notis Untuk Penamatan Pengambilan Kerja Kontraktor' which was issued earlier on 7 October 1995, F would take effect.

[50] The appellant failed to complete the planting of grass on the due date ie on 20 May 1996 and consequently, the respondent invoked the termination notice of 7 October 1995, which was communicated to the G appellant.

[51] In answer to the appellant's submission that it had completed the contract save for the grass-turfing, the respondent contended that the Ministry of Education was 'compelled' to accept the contract even though it H was not fully completed, since it was imperative that the students from the said area had to be placed there after having been temporarily placed in another school.

[52] The respondent contended that due to the appellant's failure to I complete the contract, the respondent had no alternative but to appoint another contractor to do the same, at a cost of RM450,000.

[53] This amount also represented the major portion of the respondent's counterclaim, supported by the respondent's final confirmation issued by the respondent. This was served on the appellant. A

[54] The respondent contended that the amount claimed by the appellant in the sum of the RM501,817.66 was not paid by them to the appellant, since this amount was taken and considered as a set off payment towards the LAD imposed, due to the appellant's failure and delay in completing the contract. B

[55] The learned High Court judge found in favor of the respondent on the ground that: C

(a) it was undisputed that the appellant failed to complete the contract on or before 31 October 1994;

(b) that even after an extension of time till 31 October 1994 granted by the respondent to complete the contract, the appellant failed to do so and was given a further extension. Even when the contract was terminated on 5 July 1996, the contract still remained uncompleted; The learned judge ruled that the appellant's failure to complete the contract despite the extensions of time arose from the appellant's inability or incompetence to do the same; D E

(c) The appellant's application to dispense with the LAD is untenable, in view of its inability to complete the contract;

(d) the learned judge rejected the appellant's contention that it had completed the contract on 5 June 1996, in the light of the minutes of a meeting held on 18 November 1996 which spoke of a new contract to build and complete a school and other related works at Felda Palong 8, Jempol, Negeri Sembilan (ie the same site of the contract between the appellant and the respondent), at a cost of RM450,000. F G

[56] On the whole, the learned judge was of the view that the appellant had not complied with the specifications in the contract and there was nothing in evidence to suggest that the respondent had allowed any deviation or variation from the said specifications; that in terminating the said contract and imposing the LAD, the respondent had not been actuated by malice or mala fides, since they had acted well within the scope of the contract. H

[57] In view of the above, the learned judge dismissed the appellant's claim and allowed the respondent's counterclaim. I

[58] My view of this appeal is this. The facts as narrated above are clear enough. There are several issues in the instant case which can be distilled into just two posers. They are:

(1) Did the non-completion of the grass turfing on the due date/delay by the appellant in completing the contract, amount to a breach of the fundamental terms of the contract, going to its root, entitling the respondent to terminate the contract and claiming damages?

(2) Had the appellant performed its obligation under the contract (both principal and supplementary)?

[59] Let us see what would be the position in the light of the notice of termination pursuant to cl 51(a) and letters and notices substantiating the same.

[60] Clause 51 of the contract which reads as follows:

51. PENAMATAN PENGAMBILAN KERJA KONTRAKTOR

(a) Tanpa menjejas apa-apa hak atau remedi lain yang dipunyai oleh Kerajaan, jika Kontraktor melakukan kemungkiran mengenai mana-mana satu atau lebih daripada perkara-perkara yang berikut, iaitu:

(i) ...

(ii) ...

(iii) ...

(iv) jika dia mungkir atau berulang kali cuai mematuhi suatu notis bertulis daripada PP untuk menukar dan mengganti apa-apa kerja yang cacat atau bahan atau barang-barang yang tidak sesuai, atau

(v) ...

maka PP boleh memberi kepadanya suatu notis yang dihantar dengan pos berdaftar atau dengan serah-hantaran yang direkodkan menyatakan kemungkiran itu, dan jika Kontraktor samada meneruskan kemungkiran itu selama empat belas (14) hari selepas penerimaan notis itu atau pada bila-bila masa selepas itu mengulangi kemungkiran itu (samada pernah diulangi dahulunya atau tidak), maka Kerajaan boleh dengan demikian itu melalui suatu notis yang dihantar dengan pos berdaftar atau dengan serah-hantaran yang direkodkan menamatkan pengambilan kerja Kontraktor di bawah Kontrak ini.

[61] In view of the above clause, let us see what was the nature of the purported notice given to the appellant.

[62] By letter dated 5 July 1996, the respondent sent a notice by registered post to the appellant. It reads thus:

> Adalah didapati pihak tuan telah gagal mematuhi Perakuan Persetujuan yang telah ditandatangani oleh Mesyuarat Khas pada 27 April 1996 yang lalu, di mana kerja-kerja penanaman rumput di padang telah tidak disiapkan pada tarikh yang ditetapkan iaitu 20 Mei 1995.
>
> Dengan yang demikian, PENAMATAN PENGAMBILAN KERJA KONTRAKTOR yang telah dikeluarkan pada 07 Oktober 1995 dikekalkan.

[63] Since the respondent invoked the 'notis penamatan pengambilan kerja kontraktor' dated 7 October 1995 to effectuate the said termination of the contract, the said notice needs looking into. It reads thus:

> … Dukacita diperhatikan bahawa tuan didapati masih tidak menjalankan kerja dengan lebih pesatnya dalam tempoh EMPAT BELAS (14) HARI yang diberi dalam surat kami tersebut. Tiada juga sebarang jawapan atau alasan yang menasabah yang diterima daripada tuan. Maka sejajar dengan Fasal 51(a) Syarat-Syarat Kontrak, pengambilan kerja adalah dengan ini DITAMATKAN.
>
> Kerja akan disiapkan sejajar dengan Fasal 51(c) Syarat-Syarat Kontrak, dan tuan adalah dikehendaki menanggung segala perbelanjaan berlebihan yang akan timbul.

[64] It is noted that, an earlier notice dated 12 September 1995 was sent to the appellant by the respondent, warning them to complete the contract within 14 days upon receipt of the said notice, failing which cl 51 of the contract (to terminate the contract) will be invoked.

[65] It was due to the appellant's apparent failure to complete the project within the period of 14 days that the notice of 7 October 1995 was served on them on 5 July 1996.

[66] There appears to be non-compliance with the requirement of cl 51, in that the notice did not contain the precise ground of termination.

[67] Thus, in itself the notice was bad. The respondent's (through the senior federal counsel) attempt at rectifying this failed, and in fact it worsened the situation when it said that it was justified to terminate the contract on account of the numerous extensions given to the appellant to perform the contract.

[68] In this regard it is my view that the respondent themselves had, unwittingly or otherwise, admitted in their letter of 12 September 1995, that the appellant had, at that date, completed 93% of the contract.

The said letter of 12 September 1995 reads, inter alia:

A … kerja tuan sepatutnya sudah siap tetapi kemajuan yang dicapai setakat ini adalah 93% ...

[69] In view of the above, and as case laws have shown, the several delays caused by the appellant were not so dire as to frustrate the entire consideration of the contract. I find nothing in the contract that had placed any condition, (special or otherwise) the breach of which would entitle the innocent party to repudiate the contract.

[70] If delay by the appellant is to be the main factor for termination (quite apart from unsatisfactory work, defective workmanship etc) that particular reason cannot be said to be a condition or warranty going to the root of the contract. Although a period of time for completion is necessarily in place here, one has to construe the entire contractual terms and conduct of parties for its effect and consequence. Time was a factor but in my view time no longer became the essence and in fact was vitiated when the respondent had acquiesced several times to the extensions of time asked for by the appellant.

[71] My view is that the breach if there was any in this case, was merely inconsequential or 'trifling' as suggested by Lord Upjohn in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

The brief facts in the *Hongkong Fir Shipping* case is as follows:

> By a time charterparty dated 26 December 1956, the shipowners of MV Hongkong Fir let, and charterers hired the said ship for twenty four (24) calendar months.
>
> Clause 3 of the charterparty provided that the owners should '… maintain her in a thoroughly efficient state in hull and machinery during service …'.
>
> The vessel was delivered to the charterers on 13 February 1957 and on that day, sailed from Liverpool to Newport News, Virginia to pick up a cargo of coal and carry it to Osaka. The vessel's machinery was in reasonably good condition at Liverpool but by reason of its age, needed to be maintained by an experienced, competent, careful and adequate engine room staff. When she sailed, the chief engineer was inefficient, the engine room complement insufficient and chiefly for that reason, there were many serious breakdowns in the machinery. She was not seen eight and half weeks, off hire for about five weeks and had about £21,400 spent on her for repairs. She reached Osaka on 25 May when a further period of about 15 weeks and additional monies were required to make her ready for sea.

[72] In fact when the vessel sailed from Osaka on 15 September, there was adequate and competent engine room staff and was then admittedly in all respects, seaworthy.

[73] However the charterers repudiated the charterparty in June 1957.

[74] In an action by the owners for damages for wrongful repudiation of the charterparty in which the charterers contended, inter alia, that they were entitled to repudiate by reason of a breach by the owners of their obligation to deliver a seaworthy vessel and that the charterparty was frustrated by the delays and breakdowns, Salmon J held that although the shipowners were in breach of their obligation to deliver a seaworthy ship, seaworthiness was not a condition precedent to their rights under the charterparty and, as the charterparty had not been frustrated, they were entitled to damages.

[75] It was held on appeal by the charterers, that although the shipowners were in breach of cl I of the charterparty, the vessel being unseaworthy on delivery by reason of an insufficient and incompetent engine room staff, seaworthiness was not a condition of the charterparty a breach of which entitled the charterer at once to repudiate. Lord Diplock held that the express or implied obligation of seaworthiness is neither a condition nor a warranty but one of that large class of contractual undertakings one breach of which might have the effect ascribed to a breach of 'condition' under the Sale of Goods Act 1893, and a different breach of which might have not only the same effect as that ascribed to a breach of warranty.

[76] His Lordship also held that the delays caused by the breakdowns and repairs were not so great as to frustrate the commercial purpose of the charterparty; and that accordingly the charterers' claim failed and the appeal was dismissed.

[77] Likewise, in the instant appeal my view is that the inability of the appellant to complete the contract within the time frame is not a particular stipulation which is regarded as a condition, going to the root of the contract, that it is clear that the parties contemplate that a breach of which entitles the other party at once to treat the contract as at an end.

[78] In fact no such condition exists, either in the principal or supplementary contract.

[79] As stated by Lord Upjohn:

> … the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequence. Breaches of stipulation fall, naturally into two classes. First, there is the case where the owner by his conduct indicates that the considers himself no longer bound to perform his part of the contract; in that case, of course, the charterers may accept the repudiation and treat the contract as at an end. The second class is, of course the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with

A the terms of the contract try he never so hard to remedy it. In that case, the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

B

[80] Apart from the fact that the appellant's inability in completing the contract within the stipulated time does not go to the root of the contract, two other factors go towards showing that this failure did not frustrate the entire contract for it to be completely incapable of being performed. Firstly C there was substantial performance of the contract by the appellant and secondly there was acquiescence on the part of the respondent to vary the contractual terms, even if that acquiescence was grudging.

[81] From the evidence of parties, could it be said in all honesty, that the D appellant had completely failed in performing his side of the bargain, or that the defects were of such magnitude that the appellant could not be said to have substantially performed his contract?

E **[82]** Or put in another way: On a true construction of the contract, is entire performance a condition precedent to payment, it being a lump sum contract?

[83] The older reported cases such as *Appleby v Myers* (1867) LR 2 CP 651 F and *Whitaker v Dunn* (1887) 3 TLR 602 require complete performance by a promisor as a condition precedent to his right of recovery under an entire contract.

[84] However the rigours of the common law has since been modified by G later judicial pronouncements. It is now established by the doctrine of substantial performance that a promisor who has substantially performed his side of the contract may sue on the contract for the agreed sum, though he remains liable in damages for his partial failure to fulfill his contractual obligations.

H

[85] The statement of the law on this matter can be found in the judgment of Lord Justice Denning in *Hoenig v Isaacs* [1952] 2 All ER 176, at p 181, where His Lordship said, inter alia:

I … When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is therefore, construed as a term of the contract, but not as a condition …

[86] In the instant appeal, my view is that the contract was an entire or lump sum contract, but since the doctrine of substantial performance has not been excluded by an express provision in the agreement, it would also be necessary to examine whether the appellant had substantially performed its contract.

[87] It is my view, following the observation of the English Court of Appeal in *Bolton v Mahadeva* [1972] 3 All ER 1322, that where a contract (such as in the instant appeal) has been substantially performed, the test was substantial performance rather than whether the defects were of such a trivial nature that they could be disregarded under the de minimis rule.

[88] Following also what Gunn Chit Tuan J observed in *KP Kunchi Raman v Goh Brothers Sdn Bhd* [1978] 1 MLJ 89 in considering whether there had been substantial performance, it was relevant to take into account both the nature of the defect and the proportion between the cost of rectifying them and the contract price.

[89] In the instant appeal, it is undisputed that the appellant had, as at 12 September 1995 completed 93% of the contract works (as admitted by the respondent itself in their letter dated 12 September 1995.

[90] The appellant had clearly shown it had substantially performed the contract.

[91] Is the appellant then, entitled to payment due to it with regard to both the principal and supplementary contracts for work done?

[92] In the instant appeal, the contract was worth RM1,956,126. However authorities such as *Kiely & Sons Ltd v Medcraft* (1965) 109 Sol Jo 829 CA and *Bolton v Mahadeva* [1972] 2 All ER 1322 found that substantial performance is not to be measured by rigid financial calculation. Both Justices Salmon and Wilmer in *Kiely & Sons Ltd v Medcraft* took the view that it is for the court to consider the defects and see whether the work was substantially completed. So for every case, it is a question of fact and degree.

[93] Firstly, there is nothing on record to indicate that there are defects in the appellant's work, of which notice had been issued by the respondent to the appellant.

[94] Should there be any defect, the respondent would have issued its notice of defect to allow the appellant or any contractor for that matter, to

rectify the said defect. The respondent confirmed that they had not found any defect nor had they issued any notice of like effect. As testified by SD2:

> Adalah prosidur JKR sebarang kecacatan bangunan/projek akan dikeluarkan notis kepada Kontraktor berkenaan untuk membaiki. Di dalam kes ini, tiada senarai kecacatan dikeluarkan kepada plaintiff (appellant).

[95] The only 'defect' if it could be termed as such, was the planting of 'hydro seeding' instead of 'cow grass' on the football field. Although the respondent objected to this non-compliance of the terms of the contract, no notice was sent out by the respondent to the appellant. The respondent instead, took the drastic step of terminating the contract on the ground that the grass turfing was not completed within the time specified.

[96] It might be reminded that the appellant had in any event, completed all the contract works except the football field grass turfing and had handed over the school on 5 June 1996.

[97] Yet, the respondent terminated the contract only on account of the appellant's non-compliance with the specification to use 'cow grass' for the football field as at 20 May 1996. This was confirmed when SD2 testified that:

> Masalah hanya timbul apabila rumput padang yang ditanam tidak mengikut spesifikasi. Dan hanya berdasarkan masalah rumput ini sahaja keseluruhan kontrak plaintiff telah dibatalkan. …

[98] Given the above, it is my view that taking all factors into consideration, the respondent's termination of the contract amounted to a forfeiture, in view of the severity of the consequence. In my view, the respondent had not acted reasonably and in good faith. In fact 'bad faith' was imputed by the appellant against SD2. The appellant had tried to introduce evidence of 'bad blood' between it and SD2 during the trial. But the trial judge disallowed the issue to be raised at all. Yet, in his judgment the trial judge held that even if there was 'bad blood' as imputed by the appellant, the appellant had not established it. After having disallowed the appellant to submit on this point, it is not open for the trial judge to now make this perverse observation. It is my view that there was a misdirection on the trial judge's part on this point.

[99] By the time the project was handed over to the respondent on 5 June 1996, the appellant had been paid a total sum of RM1,362,501.40. The balance of RM501,817.66 remained unpaid.

[100] Considering the nature of the 'defect' which was merely that of replacing 'hydro seeding' with 'cow grass' and the cost of rectifying the same being only RM20,000 as quoted by the appellant, the question is whether the respondent is entitled to claim damages as claimed. A

[101] The respondent said that because of the error of the appellant in not using 'cow grass', they had to employ another contractor to do the same at the cost of RM450,000. B

[102] From the evidence led, the respondent had asked the new contractor Syarikat Azaman bin Abdul Samad to redo certain things (apart from putting the 'cow grass') which were clearly outside the scope of the appellant's contract with the respondent. C

[103] In my view, the act of the respondent, incurring extra expenses re-doing certain works by the new contractor, was not within the contemplation of nor contained in the original contract. As DW3 had given the breakdown of all the works done by the new contractor it is clear that new items were added and even the grass turfing had extra works to be done to it. The question now is: Is the respondent entitled to claim RM450,000 from the appellant as damages for non-completion of the contract? This will be answered latterly. D E

[104] Turning now to the issue of the LAD, the question is this: Is the respondent entitled to impose LAD on the appellant, in these circumstances? F

[105] First, it was undisputed that the contract was 93% complete. There was substantial performance of the contract by the appellant. There was no abandonment of the work by the appellant, nor had the appellant done anything to jeopardise the completion of the work. G

[106] Second, the various extensions given the appellant could only be viewed that the respondent had given indulgence and had waived the imposition as to time and strict compliance with the terms of the contract. H

[107] However the respondent made an untenable choice for its reason to terminate the contract, when it terminated the contract on account of 'non-compliance with grass turfing by the appointed due date'. I

[108] This reason works against the respondent in view of the principle found in *Hongkong Fir Shipping Co Ltd v Kawasaki Kaisha Ltd*, where it is clear that the breach if at all, was not so great as to frustrate the entire

A contract, nor was the breach regarded as a condition, going to the root of the contract which would entitle the other party at once to treat the contract as at an end.

[109] Third, it must not be lost sight of that the respondent, through
B PW1, had promised to waive the LAD for the contract.

[110] This is fortified by the evidence of PW3, Lee Hoch Long, a contractor where PW3 said in his testimony that PW1 will waive the LAD for the Project.
C

[111] PW1 in his evidence also stated in a meeting held on 11 October 1995 with PW2 and one Puan Natisah, the quantity surveyor for JKR, that he had the authority to waive LAD if the appellant completed the project. PW1 also allowed the extension of time for the project to be completed.
D

[112] Even if PW2 disclaimed the dispensation of LAD, the fact was that PW2 had said that dispensation of LAD was conditional upon the appellant completing the work on time. However, in view of the various extensions
E given by respondent and the fact that there was substantial performance thereof, my view is that it is not open for the respondent to now ignore the consequence of the waiver in this regard. In so doing the respondent is now estopped from imposing LAD on the appellant. The respondent is barred by the doctrine of estoppel from denying the indulgence granted to the
F appellant, which in any case amount to variation of the terms of the contract. And as both parties had acted on the basis of the said varied terms of Agreement, the respondent is now estopped by conduct from denying it (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331). It is not open for the respondent to now help themselves
G to the balance sum due to the appellant by contending that the amount is to account for LAD. In short, the respondent is not entitled to impose LAD on the appellant (which was calculated to be RM218,400).

[113] Taking the facts before me and considering the obligations of parties
H and their conduct in this contract, what seems clear is this:

[114] Although the right to terminate for breach of contract applies to all contracts, it has long been subject to certain restrictions.

I **[115]** To begin with I find that in this appeal, the notice to terminate was bad in law, for being devoid of the precise ground for termination.

[116] Secondly, the respondent's conduct in allowing extensions of time to perform the contract, entering into a supplementary contract and finally accepting the contract from the appellant on 5 June 1996, is not consistent with that of an innocent party whose right to terminate remains intact.

[117] Although an extension of time for performance does not of itself amount to an abandonment of the right to terminate for failure to perform on time, more so if granted as a matter of grace (see *Holland v Wiltshire* (1954) 90 CLR 409), other factors in this appeal indicate otherwise.

[118] In my view, when the respondent allowed the appellant continued performance of the contract on more than one occasion, and even entering into a supplementary contract, the respondent had thereby elected to affirm the contract to run its course. The appellant is entitled to regard it as such especially when the respondent accepted the contract from the appellant on 5 June 1996, which the appellant is entitled to treat as the respondent having waived its right to terminate. Nothing would be more clear and equivocal than this conduct of the respondent (see *Berry v Hodson* [1988] 1 Qd R 361; *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305).

[119] In any case, even if the respondent still had the right of election, the exercise of that right must not be delayed unreasonably (see *Champtaloup v Thomas* [1976] 2 NSWLR 264).

[120] In this case, after having accepted the contract from the appellant on 5 June 1996, the respondent, out of the blue served on the appellant the notice to terminate a month later, ie on 5 July 1996.

[121] To my mind, for the respondent to take this course of action is unconscionable, since the termination of the contract for breach results in an unjust forfeiture of the appellant's propriety interest, a fortiori when there is estoppel by conduct (see *Stern v McArthur* (1988) 165 CLR 489).

[122] This unconscionable conduct is exemplified by its claim for LAD and counterclaim of RM450,000.

[123] It is instructive to remind ourselves that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct.

[124] Consequently the respondent cannot resist payment due to the appellant for the unpaid balance of the contract, ie the sum of RM501,817.66.

[125] Now comes the issue of damages. The appellant pleaded this claim and led evidence that following on the heels of termination of the contract, it was blacklisted in so far as Government contracts are concerned.

[126] As a result, the appellant claimed that it suffered damages, which it put at RM2.8m.

[127] The question is, what would be the consequence of being blacklisted, for the appellant? For one, it would mean that no contract from the Government would come its way. It would also mean that no door will be open to it by the private sector too. This can only mean that the appellant suffered some damages due to being blacklisted. This is apparent when it is shown that before the blacklisting, several projects found their way to the appellant company as evident in the submission of learned counsel for the appellant. However there was none, after the blacklist. But I do not think that the damages it suffered is to the extent that it had claimed. The appellant led evidence of previous contracts and tenders which it had won from the Government. This was not disputed. However the frequency or even certainty of those contracts were not brought forth. In this regard, the damages claimed may be difficult to assess, but this should not be an impediment to award an applicant damages it ought to get. In the words of Vaughan Williams LJ in *Chaplin v Hicks* [1911] 2 KB 786:

> … The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.

[128] In short, my view is that difficulty of proof does not of itself, do away with the necessity of proof. The only question perhaps is, what is the standard required in such circumstances?

[129] Authorities on this subject suggest that the standard of proof only demands that evidence from which the existence of damage can be reasonably inferred, which provides adequate data for calculating its amount.

[130] Based on this principle, I would award the appellant general damages for breach of contract and give direction that the assessment of such damages be done by the senior assistant registrar of the High Court. An early hearing of the assessment is also directed.

[131] For the reasons stated in this appeal, I would allow this appeal with costs here and below. The order of the learned judge is hereby set aside.

[132] Thus I make the following order:

(a) the appellant is to be paid the unpaid contractual sum claimed, ie the sum of RM501,817.66 with interest at 8% pa with effect from 5 July 1996 till date of realisation;

(b) general damages for breach of contract, to be assessed by the senior assistant registrar of the High Court. An early date shall be fixed for such assessment;

(c) the respondent must pay the costs of this appeal and those incurred in the court below;

(d) deposit shall be refunded to the appellant; and

(e) the respondent's counterclaim is dismissed with costs.

Appeal allowed with costs here and below.

Reported by Sally Kee